IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 25 OF 2005

The Secretary
Deccan Education Society
and ors. .. Petitioners

Vs.

Shri Rajanikant Sundarlal Sabale
and ors. .. Respondents

Mr. V.D. Borwankar for Petitioners.
Mr. Suresh S. Pakale for Respondent No.1.
Mr. S.V. More, AGP for Respondent Nos.2 and 3.

CORAM: B.H. MARLAPALLE, J.

Date : October 19, 2005.

P.C.:

1. The Civil Revision Application arises from order dated 16/12/2004 passed by the learned III Joint Civil Judge, Jurnior Division at Satara. The respondent no.1 is an Assistant Teacher under the petitioner no.1-Society and he came to be transferred from the Hindustan Antibiotic High School, Pimpri, Pune to New English School at Satara vide transfer order dated 10/6/2002. He approached this court in Writ Petition No.4382 of 2002 and prayed for the transfer order to be quashed and set aside and further for his transfer from Satara to Pune. A Division

Bench of this court was pleased to dismiss the petition on 23/9/2002 by a reasoned order. On or about 26/7/2003 the respondent no.1 approached the court of learned Civil Judge, Senior Division at Satara and filed Regular Civil Suit No.314 of 2003 against the said transfer order. The first relief in the suit is regarding declaration of the transfer order as illegal and malafide and it be cancelled on that count. Secondly, he prayed for his retransfer to Pune on par with retransfer of defendant no.7 and thirdly, he sought an injunction against the approval of the transfer/appointment of defendant no.7 by defendant no.4.

2. The defendant no.1 filed an application under Section 9-A of C.P.C. and raised the issue of jurisdiction of the trial court to entertain and try the suit. Two grounds were raised in this application challenging the jurisdiction of the trial court, namely, (a) the plaintiff being an employee within the meaning of Maharashtra Employees of Private Schools (Conditions of Service) Regulations Act 1977 and the Rules framed thereunder, he had a remedy before the School Tribunal by filing an appeal under the said Act

and (b) Writ Petition No.4382 of 2002 having been dismissed by this court, the plaintiff was estopped from challenging the transfer order before any other forum subordinate to this court. In short, it was contended that the doctrine of res judicata was applicable and, therefore, the trial court was not competent to entertain and try the suit.

3. In the impugned order, the trial court has recorded its findings on the first point only, whereas on the second point the impugned order is totally silent. Mr. Pakale the learned counsel for the plaintiff referred to the decision in the case of Smt. Poonam Lata vs. M.L. Wadhawan and anr. reported in **AIR 1987 SC 2098** and submitted that the presumption would be that the defendant had given up the challenge to the jurisdiction of the trial court on the second point. The learned counsel for the defendant is emphatic in his arguments that the challenge on the second point was not given up and it was the trial court who did not consider the said issue. The learned counsel for the defendant referred to the decision in the case of Pondicherry Khadi & Village Industries Board vs. P. Kulothangan and anr.

reported in **AIR 2003 SC 4701** and more particularly paras 11 and 12 therein, in support of his contentions that the principle of res judicata operated against the jurisdiction of the trial court to entertain and try the suit on account of the Writ Petition filed by the plaintiff having been dismissed by this court before the suit was filed.

4. It would be necessary that the trial court records its findings on the second issue as well. More so, it is clear from the reliefs claimed in the suit filed before the trial court that the transfer order dated 10/6/2002 is under challenge in the said suit. It is not a case of the plaintiff that after the defendant no.7 was retransferred, he made an application to the Management and prayed for a similar concession for his retransfer to Pune and the same was not considered by the Management thereby giving rise to a fresh cause of action to file the suit. In fact, in para 8 of the plaint the cause of action for the suit also has been referred to the transfer order dated 10/6/2002 as well as the retransfer of defendant no.7.

5. This revision, therefore, succeeds partly and it is hereby allowed. The impugned order is hereby quashed and set aside. The application filed under Section 9-A of C.P.C. is restored to the file of the trial court for deciding afresh on the point of res judicata while noting that the defendant no.1 has given up the challenge to the jurisdiction of the trial court on the first point. The trial court is directed to hear and decide the application as expeditiously as possible and preferably within a period of two months from the receipt of writ from this court. Rule made absolute accordingly with no order as to costs.

(B.H. Marlapalle,J.)